

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 9, 2009

NATHANIEL MORTON CHAMPION v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Coffee County
No. 35, 421 Charles Lee, Judge

No. M2008-01821-CCA-R3-PC - Filed October 20, 2009

The petitioner, Nathaniel Morton Champion, appeals the trial court's denial of his petition for post-conviction relief. The petitioner contends that he is entitled to post-conviction relief from his conviction for possession of cocaine and the resulting three-year sentence because he received the ineffective assistance of counsel at trial. The state argues that this court should dismiss the petitioner's appeal because he did not file it within the one-year statute of limitations. We conclude that the petition was untimely, and we dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

H. Thomas Parsons, Manchester, Tennessee, for the appellant, Nathaniel Morton Champion.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Charles Michael Layne, District Attorney General; and Jason M. Ponder, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

Following a jury trial, the petitioner was convicted of possession of cocaine and sentenced to three years in prison. On appeal, this court affirmed the petitioner's conviction. *See State v. Nathaniel Champion*, No. M2004-02143-CCA-R3-CD, 2005 WL 1114428, at *1 (Tenn. Crim. App., at Jackson, May 11, 2005). The following is a summary of the facts of the case taken from this court's opinion on direct appeal:

Virginia Elrod testified that Detective Brent Perry asked her to contact the [petitioner] to buy cocaine from him, so she called the [petitioner] on a pay phone,

and the [petitioner] agreed to meet her. Elrod testified that the [petitioner] arrived in a blue car about twenty minutes after she called him, and she asked him for sixty dollars worth of crack cocaine. Elrod testified that Detective Perry gave her sixty dollars. She said that the [petitioner] went into a gas station, came back out, gave her the cocaine, and she gave him the sixty dollars. She said that the cocaine was not wrapped in anything, and she gave the cocaine to Detective Perry. She said that there were detectives across the street who watched the entire transaction.

On cross-examination, Elrod testified that this was the first time that she had been contacted by the Tullahoma Police Department. She said that she had previously met the [petitioner] about three or four times. She testified that she called the [petitioner] at his home, and she had obtained his number through a friend. Elrod said that the [petitioner] answered the phone call, she spoke with him for about five minutes, and she told the [petitioner] that she “wanted some rock.” She said that, at that time, she did not tell the [petitioner] how much cocaine she wanted. She testified that, when she met the [petitioner], she was wearing a recording device provided by the police. Elrod said that the police gave her sixty dollars to purchase drugs, and she was not given any other money. She said that the police did not ask her if she had any other money, and she was not searched by the police for other drugs.

Elrod testified that the [petitioner] arrived at the gas station about twenty minutes after she had called him, and she had not known what kind of car he would be driving. She testified that she was aware that the police officers would be watching any transaction that occurred. Elrod said that, about fifteen minutes after the transaction at the gas station, she met with police officers behind the gas station. She said that the police took her to the police station, and she gave them the cocaine. Elrod testified that she has participated in a total of two drug transactions for the Tullahoma Police Department, but this transaction was her first, and the second drug transaction did not involve the [petitioner]. She said that, after these events, she has seen the [petitioner] on a couple of occasions.

Detective Jason Ferrell testified that, on March 15, 2002, he and Detective Perry met and had a conversation with a confidential informant, Elrod. He said that, based on that conversation, Elrod was given sixty dollars, and they placed a recording device on her. He testified that, as she left the office, he checked her to ensure that she had no narcotics on her, and, specifically, he said that he “patted her pockets,” and Detective Perry asked her to empty her pockets. Detective Ferrell testified that he and Detective Perry dropped her off at the gas station. He said that he went to a building across the street, and he videotaped the transaction, and Detective Perry was responsible for the audio of the recording device. He testified that he knew that Elrod was going to call the [petitioner], and she ordered sixty dollars worth of crack cocaine. Detective Ferrell testified that he heard Elrod make the phone call, but he

did not hear her specifically say the [petitioner's] name because he was responsible for the videotape.

Detective Ferrell testified that, about twenty minutes after Elrod called the [petitioner], he observed a blue four-door vehicle, which the [petitioner] was driving, arrive at the gas station. He said that he watched Elrod approach the [petitioner's] vehicle, have a conversation, and then the [petitioner's] vehicle pulled up to the front doors of the gas station. Detective Ferrell said that the [petitioner] entered the store and came back out a few minutes later with a bag. He said that the [petitioner] then drove through the parking lot, and stopped briefly at the phone booth where Elrod was located before leaving the parking lot. Detective Ferrell said, once the [petitioner] was out of the area, Elrod walked towards the building, and he and Detective Perry picked her up. He said that Elrod gave him cream-colored rocks that he suspected were crack cocaine, and he placed the rocks in an evidence bag.

On cross-examination, Detective Ferrell testified that he has known the [petitioner] for seven years. He said that he has known Elrod for about one year, and she has not conducted any other drug transactions in which he was involved. He said that Elrod approached the police and told them that she would attempt to purchase narcotics from two individuals, one of whom was the [petitioner]. Detective Ferrell said that he did not provide Elrod with the [petitioner's] phone number, he did not know what phone number she was calling, and he did not attempt to determine in whose name the phone number was registered. He testified that, during this transaction, he could hear what was being said in the background, but he was not paying close attention because he was operating the video recorder. He said that he did not turn the video recorder off at any time during this transaction, and there was no splicing of the videotape. He said that the videotape focused on other vehicles, at some points, because he was not sure in what vehicle the [petitioner] would arrive at the gas station. Detective Ferrell said that he did not run the license plate number on the [petitioner's] vehicle, and, therefore, he did not know to whom the car was actually registered. He testified that he did not see anyone else in the [petitioner's] vehicle. He said that, based on the videotape, he did not see the transaction itself occur, and he could not see anything "pass hands." Detective Ferrell testified that, after he finished recording, he and Detective Perry picked up Elrod, she gave him the cocaine, and he put the cocaine in the evidence bag. He said that he did not check Elrod for other drugs after she gave him the cocaine. He testified that he did not know when the [petitioner] was arrested for this incident, but he knew that it was not within forty-eight hours after the transaction.

Brent Perry, a detective with the Tullahoma Police Department, testified that, on March 15, 2002, he was involved in a narcotics operation. He said that he was contacted by Elrod and decided to use her as an informant. He explained that Detective Ferrell had a previous discussion with Elrod, and she told him that there

were two individuals that she could purchase narcotics from, one of whom was the [petitioner]. Detective Perry testified that, on March 15, 2002, he met with Elrod at the police station and gave her sixty dollars. He said that he asked Elrod to empty her pockets, and Detective Ferrell conducted a patdown search of her to insure that she had no narcotics on her. He testified that he and Detective Ferrell drove Elrod to the gas station, dropped her off, and proceeded to set up surveillance across the road.

Detective Perry testified that, to his recollection, Elrod had conversations with some other people while she was at the gas station, but she did not have close contact with anyone but the [petitioner]. He said that Elrod had the [petitioner's] phone number, and she called the [petitioner's] residence. He testified that, approximately thirty minutes later, a blue Oldsmobile four-door vehicle arrived, and Elrod approached the driver's side window, where she had a conversation with the [petitioner]. He said that the vehicle then pulled to the front of the gas station, and the [petitioner] exited the vehicle and entered the gas station. Detective Perry testified that the [petitioner] was in the store for a short time, returned to his vehicle, drove around the parking lot, stopped, and then had a short conversation with Elrod. He said that the [petitioner] then exited the parking lot and drove away toward his residence.

Detective Perry testified that, based on the audio recording of the transaction, he did not hear Elrod have a conversation with anyone else about selling drugs. He testified that Elrod brought back several small cream-colored rocks to the police. He said that, when he and Detective Ferrell picked up Elrod from the parking lot, she handed the rocks to Detective Ferrell, who placed the items in an evidence bag. Detective Perry said that, when they returned to the police station, he sealed and initialed the evidence bag. He said that he mailed the narcotics to the Tennessee Bureau of Investigation ("TBI") Crime Lab. He testified that the TBI sent the evidence back to him, and he put the evidence into locked storage, so that the evidence could be held safely until trial. Detective Perry testified that, through a court order, the [petitioner] requested that the narcotics be sent to an independent laboratory for analysis. He said that he sent the narcotics, in the evidence bag, to an independent laboratory and that the evidence was in a rock form, even after the TBI completed their analysis. Detective Perry said that he did not receive anything back from that laboratory.

On cross-examination, Detective Perry testified that either he or Detective Ferrell put the body wire on Elrod. He said that he and Detective Ferrell drove Elrod to the gas station, dropped her off, and parked directly across the street. He testified that he took the equipment from the vehicle and went to the third floor of the building across the street. Detective Perry testified that he had visual contact with Elrod during most of the transaction. He said that he did not have anything that enhanced his vision, such as binoculars. Detective Perry testified that he could not specifically state the

exact moment that the transaction occurred, but a transaction did take place. He testified that the building where he recorded the transaction is about thirty-five yards from the front of the gas station. Detective Perry said that there were two transactions that were supposed to occur that evening, but the phone call that Elrod made was to the [petitioner], not the second person. He said that, on the audio tape, he could hear the male voice, but he did not know exactly what was said.

Detective Perry testified that the [petitioner] approached Elrod two times during the operation. He said that, after the exchange, the tape was stopped, and he began to pack up the equipment. He testified that he proceeded to drive to the gas station, and Elrod handed the cocaine to Detective Ferrell, who placed it in a bag and carried it to the police station. Detective Perry said that Elrod was not searched right after she handed the police the cocaine, but was searched before the next purchase, which was unrelated to the [petitioner] and occurred about an hour later. He testified that he did not take the bag that contained the cocaine to the TBI laboratory, and he did not remember if he picked up the evidence from the laboratory. He said that he packed the evidence bag and sent the narcotics to the independent laboratory. Detective Perry testified that the drugs came back to him, but he agreed that there was nothing on the package that directed it to the Tullahoma Police Department, and he did not speak with anyone from the independent laboratory. Detective Perry testified that the evidence was previously in rock-like form, but is not in that form anymore. He said that, unless something was done to the narcotics at the independent laboratory, it was the same cocaine that was purchased on March 15, 2002.

Adam Gray, a special agent and forensic chemist with the TBI, testified that he received an evidence bag with the [petitioner's] name written on it on April 5, 2002, and he tested the contents of the bag on April 22. He said that the evidence bag was taped and sealed and contained "a loose rock-like substance." He testified that he performed a presumptive and confirmatory test on the contents of the bag, and he determined that it was 0.2 grams of cocaine.

On cross-examination, Agent Gray testified that he first performed the presumptive test, which employs an ultraviolet light device. He said that he did not know if there was one rock or several rocks because the substance can break apart during handling. He testified that the confirmatory test is specific to cocaine. He testified that he weighed all of the rock-like substance in the evidence bag, not the bag itself, to determine how much cocaine was there, and he said that he cannot test the entire sample because he leaves a portion of the substance in case any retesting is needed. He said that, after the tests were performed, he put the evidence into a vault and prepared the results.

Id. at *1-4.

Based upon this evidence, a Coffee County jury convicted the petitioner of the sale of cocaine and the trial court sentenced him to three years in prison. On May 11, 2005, this court affirmed the judgment of the trial court. *See Id.* at *1. On October 24, 2006, the petitioner filed a *pro se* petition for post-conviction relief.

In his petition for post-conviction relief, the petitioner argues that he received the ineffective assistance of counsel. Specifically he argues that counsel was ineffective for failing to: (1) investigate whether the jury was properly impaneled, (2) address the deficiencies in the preoperation search of the undercover purchaser, (3) cross-examine witnesses about the undercover purchaser's motivation, and (4) cross-examine witnesses regarding whether the undercover purchaser bought the drugs from another drug dealer that was at the scene. In response, the state argues that this court should dismiss the petition for post-conviction relief because it is untimely.

Analysis

As a preliminary matter, we note that the state did not raise the statute of limitations issue in the post-conviction court; but instead, raises it for the first time in this court. Generally, an appellate court will not allow a party to raise an issue for the first time on appeal because such action denies the adversary opportunity to rebut the issue with evidence and argument. *See Walsh v. State*, 166 S.W.3d 641, 645 (Tenn. 2005) (“Issues not addressed in the post-conviction court will generally not be addressed on appeal.”); *State v. Adkisson*, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994) (“[A] party will not be permitted to assert an issue for the first time in the appellate court.”); *see also* Tenn. Code Ann. § 40-30-110(f) (“There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived.”). Although the state did not address the issue in the court below, the language of the post-conviction statute confers jurisdictional import to the timely filing of a petition and this court must resolve the question of timeliness before any adjudication on the merits may properly occur. *Antonio L. Saulsberry v. State*, No. W2002-02538-CCA-R3-PC, 2004 WL 239767, (Tenn. Crim. App. at Jackson, Feb. 9, 2004), *perm app. denied* (Tenn. 2004) (citations omitted). Moreover, the statute of limitations for filing a post-conviction petition is not an affirmative defense which the state must assert. *State v. Nix*, 40 S.W.3d 459, 464 (Tenn. 2001).

Pursuant to Tennessee Code Annotated section 40-30-102(a), a person must petition for post-conviction relief within one year of the date of the final action of the highest state appellate court to which they take an appeal or, if they take no appeal, within one year of the date on which the judgment becomes final. The statute further provides that:

The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such an action and is a condition upon its exercise.

Id. However, despite the one-year statute of limitations, a post-conviction court may still consider an untimely petition if: (1) the highest state appellate court or the United States Supreme Court established a new constitutional right with retrospective application, (2) new scientific evidence has established the petitioner's innocence, or (3) a court has ruled that a previous conviction that enhanced the petitioner's sentence was invalid. Tenn. Code Ann. § 40-30-102(b). A court may also consider an untimely petition if applying the statute of limitations would deny the petitioner due process. *Burford v. State*, 845 S.W.2d 204, 209-10 (Tenn. 1992).

In the present case, this court affirmed the judgment of the trial court on May 11, 2005, and the petitioner did not appeal this court's decision. When this court, the highest state appellate court to which the petitioner appealed, affirmed the petitioner's conviction, the statute of limitations for filing a petition for post-conviction relief began to run. Thus, the petitioner's post-conviction petition, which he filed on October 24, 2006, was untimely and barred by the one-year statute of limitations. The petitioner offered nothing in his petition, or at the post-conviction hearing that explains why he did not file his petition within the statute of limitations. "[I]t is incumbent upon a petitioner to include allegations of fact in the petition establishing either timely filing or tolling of the statutory period." *Nix*, 40 S.W.3d at 464 (citing Tenn. Code Ann. § 40-30-204(e)). "Failure to include sufficient factual allegations of either compliance with the statute or incompetence requiring tolling will result in dismissal." *Id.* (citing Tenn. Code Ann. § 40-30-206(b)). The petitioner has not asserted that his claim for relief falls within any of the recognized exceptions. In addition, there are no facts that indicate the court should toll the statute of limitations for due process considerations. Furthermore, nothing in the record suggests that the petitioner did not have "the reasonable opportunity to assert a claim in a meaningful time and manner." *Seals v. State*, 23 S.W.3d, 272, 279 (Tenn. 2000).

Although the state did not raise the issue of the statute of limitations at trial level, we must still dismiss the petitioner's appeal if we conclude that the trial court did not have jurisdiction to consider the petition because it was untimely and that due process considerations do not require tolling of the statute of limitations. *See Antonio L. Saulsberry*, 2004 WL 239767, at *2. The petitioner filed his claim for post-conviction relief outside the one-year statute of limitations and no exceptions apply that would toll that statute of limitations. Accordingly, we conclude that the trial court did not have, nor do we have jurisdiction to consider the petition for post-conviction relief.

Conclusion

Based on the foregoing, we dismiss the petitioner's appeal.

J.C. McLIN, JUDGE